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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re RICHARD V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. RICHARD V., Defendant and Appellant.	A155535 (Contra Costa County Super. Ct. No. J18-00711)

Richard V. appeals from a dispositional order following his plea of no contest to one count of misdemeanor battery. On appeal, he challenges a condition of probation authorizing searches of his electronic devices, arguing that the condition is both unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad. He also contends the court erred when it set a maximum term of confinement. We shall strike the maximum term of confinement, but shall otherwise affirm the court's dispositional order.

BACKGROUND

On July 25, 2018, a juvenile wardship petition was filed against appellant, pursuant to Welfare and Institutions Code section 602, subdivision (a), alleging three counts of misdemeanor battery (Pen. Code §§ 242, 243, subd. (a)).

The allegations of the petition arose from an incident that took place on the afternoon of July 23, 2018, which the probation officer summarized as follows, based on a Concord Police Department report: "[O]fficers responded to reports of a physical altercation involving several subjects at Sun Valley Mall. Upon arrival, officers found the two victims, Megan [D.] and James [Q.] on one side of the parking lot and four juveniles, including [appellant] and codefendant Miguel [A.], standing on the opposite side of the parking lot. The officer instructed the juveniles to sit down. While sitting down [appellant] and codefendant Miguel began moving around, reaching into their pockets, after being instructed not to do so. The officer placed [appellant] and codefendant Miguel in handcuffs.

"The officer contacted victim [James Q.] and he indicated to the officer he and his girlfriend, victim [Megan D.], had driven to the mall [where they] observed the juveniles jumping on vehicles and sliding on their hoods. According to [James Q.], it appeared the juveniles were checking door handles, as if attempting to burglarize the vehicles. In addition, he observed the juveniles firing fireworks in the parking structure. [James Q.] did not want his vehicle burglarized; therefore, he decided to stay by his vehicle, while [Megan D.] went inside JC Penny to shop and inform a security guard of the events taking place. When [Megan D.] was walking away, [James Q.] heard one of the juveniles state, 'Look at that ass! That Slut!' [James Q.] told the juveniles to leave his girlfriend alone. The juveniles approached [James Q.] and surrounded him, stating 'Nigga, You bitch, I'm strapped.' Codefendant Miguel, then grabbed his waistband and partially lifted his sweatshirt, as if he was drawing a firearm. [James Q.] stated he believed codefendant Miguel had a firearm, and he feared he would be hurt. [Appellant] then pushed [James Q.] with both hands, causing him to fall backwards. Codefendant Miguel attempted to tackle [James Q.] by grabbing his waist and legs, attempting to knock him down to the ground. Upon seeing this, [Megan D.] attempted to stop them by getting in between her boyfriend and the juveniles. [Appellant] grabbed [Megan D.] and 'threw her five to eight feet away' causing her to strike one of the garage pillars. [Megan D.] began to cry after hitting the ground and [appellant] walked over, standing over her as if he was going to hit

her[.] [James Q.] then pushed [appellant] away from her. Codefendant Miguel grabbed [James Q.] by the waist again and punched him. [Appellant] also punched him once, in the face with his right fist. At that point, a witness intervened, yelling for everyone to stop fighting. All four juveniles left the area; however, they returned about five minutes later to the scene.

"According to [James Q.], [appellant] and codefendant Miguel were the primary aggressors. He indicated the other two juveniles . . . struck him with their hands, but he did not know where they were striking him, as they 'boxed' him and [Megan D.] in while [appellant] and codefendant Miguel attacked them.

"The officer observed a large contusion on [James Q.'s] face and a possible broken nose. [James Q.] declined medical attention at the scene, indicating he was planning on going to the hospital after providing his statement. [¶] . . . [¶]

"The officer contacted [appellant] and he was 'extremely agitated and confrontational.' [Appellant] was previously handcuffed, but had slipped his hands out of the cuffs and they were now in front, on his lap. [Appellant] challenged the officer to fight and would not inform the officer what had transpired." While an officer was transporting appellant and Miguel to juvenile hall, he heard appellant tell Miguel, " 'Man, that dude was a bitch. I punched him once and he fell back.' "

When interviewed by the probation officer, appellant said he had only recently tried marijuana and had smoked it a few times. He said "he smokes alone and purchases the marijuana 'off the streets.' . . . The minor stated on the day of the offense, he 'accidentally' took a sip of [S]prite containing Xanax." Appellant's mother told the probation officer that, "[a]s a consequence for [appellant's] involvement [in the offense], he . . . no longer has a cell phone . . . ."

On August 10, 2018, pursuant to a negotiated disposition, appellant pleaded no contest to the first count of the petition and the court dismissed the remaining two counts.

On September 7, 2018, the court adjudged appellant a ward of the court and placed him on probation consisting of 60 days of home supervision with various conditions.

On September 24, 2018, appellant filed a notice of appeal.

DISCUSSION

I. *Electronic Search Condition*

Appellant contends the probation condition authorizing searches of his electronic devices is both unreasonable under *Lent, supra,* 15 Cal.3d 481 and unconstitutionally overbroad.[1]

A. *General Legal Principles*

"When a minor is made a ward of the juvenile court and placed on probation, the court 'may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' [Citations.] ' "In fashioning the conditions of probation, the . . . court should consider [appellant's] entire social history in addition to the circumstances of the crime." ' [Citation.] The court has 'broad discretion to fashion conditions of probation' [citation], although 'every juvenile probation condition must be made to fit the circumstances and [appellant].' [Citation.] We review the imposition of a probation condition for an abuse of discretion [citation], taking into account 'the sentencing court's stated purpose in imposing it.' [Citation.]

"A juvenile court's discretion to impose probation conditions is broad, but it has limits. [Citation.] Under *Lent*, which applies to both juvenile and adult probationers, a condition is 'invalid [if] it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' [Citations.] 'This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.' [Citation.]" (*In re P.O.* (2016) 246 Cal.App.4th 288, 293–294 (*P.O.*), citing *Lent, supra,* 15 Cal.3d at p. 486.)

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[1] We observe that the law in this area is unsettled and there are conflicting court of appeal opinions, as well as a number of cases pending review in the Supreme Court on the issue of reasonableness of electronic search conditions. (See, e.g., *In re Juan R.* (2018) 22 Cal.App.5th 1083, 1089 & fn. 3 [citing cases in this District reaching different conclusions regarding electronic search conditions and cases in which Supreme Court has granted review on this issue], review granted Jul. 25, 2018, S249256.)

"When a probation condition imposes limitations on a person's constitutional rights, [the court] ' "must closely tailor those limitations to the purpose of the condition" '—that is, the probationer's reformation and rehabilitation—' "to avoid being invalidated as unconstitutionally overbroad." ' [Citations.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the [probationer]'s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' [Citation.] ' " 'Even conditions which infringe on constitutional rights may not be invalid [as long as they are] tailored specifically to meet the needs of the juvenile.' " ' [Citations.]

"A probation condition imposed on a minor must be narrowly tailored to both the condition's purposes and [appellant's] needs, but ' " ' "a condition . . . that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court." ' " ' [Citations.] 'This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may "curtail a child's exercise of . . . constitutional rights . . . [because a] parent's own constitutionally protected 'liberty' includes the right to 'bring up children' [citation] and to 'direct the upbringing and education of children.' [Citation.]" ' [Citation.] Whether a probation condition is unconstitutionally overbroad presents a question of law reviewed de novo. [Citation.]" (*P.O.*, *supra*, 246 Cal.App.4th at p. 297.)

B. *Legal Analysis*

The challenged electronic search condition in this case, imposed over defense counsel's objection that it was both unreasonable under *Lent* and constitutionally overbroad, provides: "You must submit your cell phone or any other electronic device under your control to a search of any medium of communication reasonably likely to reveal whether you are complying with the terms of your probation, with or without a search warrant, at any time of day or night. Such medium of communication includes

text messages, voicemail messages, photographs, email accounts [and] other social media accounts and applications such as Snapchat, Instagram, Facebook, and Kik. You shall provide access codes to Probation or any other peace office upon request to effectuate such search."

The juvenile court explained its reason for imposing the condition: "I am going to impose an electronic search condition because I'm—the stay away orders and no contact with co-responsible." The related conditions of probation to which the court referred included the condition that appellant have no "contact whatsoever, either directly or indirectly, through any third party or any other electronic means, with Miguel [A.]," the other two minors involved in the attack, or the two victims.

1.

An electronic search condition, such as the one imposed here, may be reasonably related to future criminality in a particular case, even where the underlying offense is not directly tied to the use of electronic devices, when a minor's history and overall circumstances make it reasonable for the probation department to search electronic devices and/or internet activity to monitor compliance with conditions such as refraining from use of drugs (as in *P.O.*, *supra*, 246 Cal.App.4th 288) or avoiding contact with specified individuals or prohibited locations. But if there is nothing in a minor's current offenses, criminal history, or personal circumstances demonstrating a predisposition to use electronic devices in connection with criminal activity, there is no basis for concluding an electronic search condition " 'will serve the rehabilitative function of precluding [the minor] from any future criminal acts.' " (*In re Erica R.* (2015) 240 Cal.App.4th 907, 913.) The condition thus must be reasonably related to future criminality in that it would be a reasonable means of deterring future crime by this particular minor, based on all the circumstances of this particular case. Moreover, a condition that authorizes searches of cell phones and electronic accounts accessible through such devices may be constitutionally overbroad if it is not limited to the types of data likely to further a minor's rehabilitation, such as whether the minor is complying with other conditions of probation. (*P.O.*, at p. 298.)

In this case, appellant committed the battery offense with three other minors, and the court expressly imposed the electronic search condition to enable the probation officer to monitor appellant's use of electronic means of communication to ensure that he was complying with other probation conditions requiring that he stay away from Miguel A., the other two minors with whom he participated in this violent offense, and the victims. Appellant's electronic devices (e.g., a cell phone, tablet, or computer) are the obvious means by which he could communicate with prohibited individuals. Thus, the electronic search condition, which was intended to prevent appellant from committing a similar offense with this same group of perpetrators or against these same victims, was reasonably related to potential future criminal activity, and its imposition was not an abuse of discretion. (See *P.O.*, *supra*, 246 Cal.App.4th at p. 295; see also *People v. Olguin* (2008) 45 Cal.4th 375, 380–381 ["[a] condition of probation that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality' "]; compare *In re Erica R.*, *supra*, 240 Cal.App.4th at pp. 910–911, 913 [where juvenile court imposed electronic search condition based, not on specific circumstances of minor whose crime was misdemeanor possession of Ecstasy, but on fact that " 'many minors, who are involved with drugs tend to post information about themselves and drug usage,' " there was " 'no reason to believe the current restriction [would] serve the rehabilitative function of precluding [the minor] from any future criminal acts' "].)

2.

We also find that the electronic search condition was narrowly tailored to the condition's purposes and appellant's needs. (See *P.O.*, *supra*, 246 Cal.App.4th at p. 297.) The condition does not allow for unfettered access to all of appellant's electronic information, but instead is limited to means of communication that would reveal whether he is in contact with any of the people included in the stay away conditions. In the circumstances of this case, the electronic search condition was not overbroad, considering its narrow focus on means of communication, appellant's rehabilitative needs, and the deterrent purpose of the condition. (See *ibid.*)

II. *Maximum Term of Confinement*

Appellant contends the court's statement at the dispositional hearing that he is subject to a maximum term of confinement of 180 days[2] must be stricken because appellant was not removed from parental custody. Respondent agrees.

Pursuant to Welfare and Institutions Code section 726, subdivision (d)(1), the juvenile court shall specify a maximum term of confinement only if the minor is removed from the physical custody of his or her parent or guardian. (See *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541 [when minor is not removed from parent's physical custody, court has no statutory authority to specify a maximum term of confinement].)

We agree with the parties that because appellant was not removed from his parents' physical custody, the court improperly set a maximum term of confinement. The appropriate remedy in this situation is to strike the term. (See *In re A.C.* (2014) 224 Cal.App.4th 590, 592; *In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 541.)

DISPOSITION

The maximum term of confinement is stricken from the juvenile court's order. In all other respects, the court's dispositional order is affirmed.

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Kline, P.J.

[2] The court specifically said, "I do find the court has authority to impose 177 days of remaining custodial time [after three days in custody]. The maximum exposure being 180."

We concur:

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Richman, J.

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Miller, J.

In re Richard V. (A155535)